

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DANE B. BROWN,

Petitioner

V.

**SUPERINTENDENT JEFFREY
DITTY, *et al.*,**

Respondents

CIVIL NO. 3:CV-11-1418

(Judge Rambo)

(Magistrate Judge Blewitt)

MEMORANDUM

Before the court is a report of the magistrate judge (doc. 13) to whom this matter was referred in which he recommends that ground one of the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be dismissed for failure to exhaust the issue in state court. The magistrate judge also found that Petitioner had exhausted in state court the other three grounds stated in his petition and recommends that these three grounds be remanded to him for further proceedings. Petitioner has filed objections to the report and recommendation.

Ground one of Petitioner's habeas claim is that the Supreme Court of Pennsylvania erred by denying relief on his claim that a *Brady* violation occurred when the prosecution withheld the existence of a plea agreement of a witness in exchange for favorable testimony from that witness. (Doc. 1, at p. 6.) The magistrate judge found that this issue was not raised in Petitioner's direct appeal and that Petitioner knew of this issue prior to taking his direct appeal. (*See* Doc. 11, Ex. A for issues raised on direct appeal.) Petitioner objects to this finding by the magistrate judge and asserts that he raised this issue in his subsequent appeals.

The failure to raise an issue on direct appeal that could have been raised, constitutes a procedural default. Petitioner has not responded to this specific finding by the magistrate judge; therefore, the report and recommendation will be adopted. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: February 15, 2012.

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<p>DANE B. BROWN,</p> <p style="text-align: center;">Petitioner</p> <p style="text-align: center;">v.</p> <p>SUPERINTENDENT JEFFREY DITTY, <i>et al.</i>,</p> <p style="text-align: center;">Respondents</p>	: : : : : : : : : : :	<p>CIVIL NO. 3:CV-11-1418</p> <p>(Judge Rambo)</p> <p>(Magistrate Judge Blewitt)</p>
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ORDER

In accordance with the accompanying memorandum, and upon independent review of the record before the court and the applicable law, **IT IS ORDERED THAT:**

- 1) The court adopts the report and recommendation of Magistrate Judge Blewitt.
- 2) Ground one of the petition for writ of habeas corpus has not been exhausted in the state courts and is dismissed with prejudice.
- 3) This case is remanded to Magistrate Judge Blewitt for further proceedings on the remaining grounds set forth in the petition.

s/Sylvia H. Rambo
United States District Judge

Dated: February 15, 2012.